IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANCORP, an Ohio corporation, and FIFTH THIRD BANK, an Ohio banking corporation, Plaintiffs, -against- CERTAIN UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY NUMBERS B0509QA048710, and B0509QA051310, AXIS INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, CONTINENTAL INSURANCE COMPANY, FIDELITY AND DEPOSIT INSURANCE COMPANY and ST. PAUL MERCURY INSURANCE COMPANY, Defendants.	Civil Action No. 1:14-cv-869

UNDERWRITERS' OBJECTIONS TO MAY 9, 2017 MEMORANDUM OPINION AND ORDER, DOCKET NO. 134

Defendants Certain Underwriters at Lloyd's subscribing to Policy Numbers B0509QA048710 and B0509QA051310, AXIS Insurance Company, and Federal Insurance Company (collectively, "Underwriters")[1] hereby object to certain aspects of the Memorandum Opinion and Order, Docket No. 134, dated May 9, 2017 (the "Order"), pursuant to Fed. R. Civ. P. 72(b).

Underwriters believe that the Order correctly resolved most issues raised in their Motion to Compel. Underwriters also believe, however, that the Order failed to correctly decide a few discrete issues. Underwriters therefore request that the Court overrule three aspects of the Order: (i) the Order's ruling about documents that Fifth Third neither logged nor produced (Order at 25); (ii) the

[1] The abbreviations used herein track the abbreviations used the Order.

Order's ruling about Fifth Third's work product claims (Order at 25-26); and (iii) the Order's interpretation of subpart (b) of the Bonds' Discovery Condition (Order at 16-19).

I. THE ORDER'S RULING ABOUT RESPONSIVE DOCUMENTS THAT FIFTH THIRD NEITHER LOGGED NOR PRODUCED WAS ERRONEOUS

Underwriters' Motion to Compel requested the production of responsive documents that Fifth Third had failed to either log or produce. (Dkt. 116 at PAGEID 2275). The Magistrate Judge acknowledged this portion of Underwriters' motion, but grouped it with the separate issue of Fifth Third's redactions to documents it did produce:

> The Underwriters ask this Court to compel Fifth Third to disclose more than 5,000 documents that the Underwriters claim that Fifth Third *has withheld from production*, or produced only redacted copies, *but has not properly included on its privilege log*. Apparently, these communications include all of Fifth Third's communications with outside counsel or its investigator, James Rechel, prior to commencement of this lawsuit. (Order at 27 (emphases added)).

In response to both issues, the Magistrate Judge ruled as follows: "In response, Fifth Third argues that the burden of showing what is missing from the log should be on the Underwriters. I agree." (Order at 27). This appears to reverse the usual burden of proof on privilege issues.[2] The Magistrate Judge, moreover, did not explain why Underwriters' evidence that Fifth Third had explicitly *refused* to either produce or log several categories of documents -- Dkt 116-1 at PAGEID 2602 -- was insufficient to meet this burden.

The issues raised by documents that are unlogged but produced in redacted form, and documents that are neither logged nor produced, are significantly different. As to the first category, Underwriters can comply with the Order by reviewing each page of Fifth Third's production and compiling a list of redacted documents, and then compare that list against Fifth Third's privilege log to identify which are unlogged. However, as to the second category – unlogged *and* unproduced

[2] Sixth Circuit precedents place the burden of proof as to privilege claims on Fifth Third, not Underwriters. *See Ross v. City of Memphis*, 423 F.3d 596, 606 (6th Cir. 2005); In re *Columbia/HCA Healthcare Corp. Billing Practices Litig*., 293 F.3d 289, 294 (6th Cir. 2002).

documents – Underwriters have no way to "show[] what is missing from the log." Underwriters cannot specify individual documents that, by definition, they have no ability to access. Assuming arguendo that Underwriters properly have this burden of proof, Underwriters believe that they have carried their burden by identifying categories of such missing documents, by introducing evidence of Fifth Third's admission that it would neither log nor produce its pre-litigation communications with outside counsel or James Rechel. (Dkt 116-1 at PAGEID 2602).

Accordingly, Underwriters request that the Court overrule this aspect of the Order and hold that Underwriters have sufficiently carried their burden of proof by relying on Fifth Third's explicit representation that it would refuse to either produce or log responsive pre-litigation communications with its outside counsel or James Rechel. Underwriters further request that the Court order that Fifth Third produce all such documents on the grounds that: (i) they are not privileged under the rationale established in the rest of the Order, or (ii) Fifth Third has waived all applicable privileges by refusing to log such documents despite Underwriters' request.

II. THE ORDER'S RULING ON FIFTH THIRD'S WORK PRODUCT CLAIMS WAS ERRONEOUS

Underwriters' motion requested the production of documents withheld as work product prior to litigation between Fifth Third and Underwriters. The Magistrate Judge ruled that although "[t]he work product privilege is a qualified one that will give way if the requesting party has a substantial need for the materials and an inability to obtain the information by other means[;] …the undersigned will not compel the referenced 2007-2010 work product, … because the Underwriters have not made a strong showing of relevance or substantial need." (Order at 26). Previously, however, the Magistrate Judge had correctly found that these *same* materials were both relevant and "critical" to Underwriters' defenses, and that Underwriters had no other way to access this information:

> [Fifth Third's position] does not begin to describe the critical nature of information relating to Fifth Third's date of discovery of its loss, or the lack of any alternative

> source of that information to the Underwriters. Because information vital to the core issues of this case remains within the exclusive control and knowledge of Fifth Third, the requested documents simply are outside the scope of, and are excepted from, any privilege. (Order at 15).

See also Order at 19 ("Thus, what the Discovery Agents knew about the loss for which Fifth Third seeks recovery under the fidelity bonds, prior to the expiration of the coverage period, includes both their subjective opinions and objective facts, even if their subjective understanding was informed by information that in another context, could fall within a privilege.").

Pre-Bond period and Pre-Notice documents related to the Concord litigation are directly relevant to the Bonds' discovery and notice provisions. The Concord litigation arose out of the LIPF II loan program (*i.e.*, the same loans at issue in Fifth Third's insurance claim). Indeed, Fifth Third seeks recovery from Underwriters for alleged losses relating to the so-called "empty trust loans" – the very same losses for which it sued Concord in Illinois. Concord's core defense in that Illinois litigation, and the basis for its own lawsuit against Fifth Third in New York, related to allegations of fraud against Matt Ross and others at Fifth Third.

Accordingly, Underwriters have clearly established a strong showing of both relevance and substantial need. Underwriters therefore request that the Court overrule this aspect of the Order and hold that Fifth Third must produce documents related to litigation over LIPF II that were withheld on grounds of the work product doctrine and were created prior to the date of Fifth Third's Notice of Claim on February 8, 2011.

III. THE ORDER INCORRECTLY DESCRIBED THE DISCOVERY CONDITION

The Bonds' Discovery Condition defines when a Loss has been first "discovered" by an Insured and triggers the Insured's contractual obligation to give notice to its insurers about an actual or potential claim under the Bonds. As part of the Magistrate Judge's analysis of the "Rule of Necessity" Exception to privilege claims under Ohio law, the Order examined the parties' different interpretations of the Bonds' Discovery Condition in order to identify categories of discoverable information.[3] (Order at 15-19). As summarized in the Order:

> Fifth Third maintains that the express language is restricted to the Discovery Agents' knowledge of wholly objective "facts." Thus, Fifth Third argues that the Discovery Agents (including but not limited to in-house counsel) may hold fast to their "mental impressions" under their asserted attorney-client privilege. By contrast, the Underwriters assert that the discovery condition requires analysis of both the objective facts and the subjective knowledge possessed by the Discovery Agents, meaning that "mental impressions" and similar information that otherwise might be protected by privilege falls outside the scope of any privilege for purposes of this lawsuit. (Order at 15-16).[4]

In interpreting subpart "a" of the Discovery Condition, the Magistrate Judge noted that the Sixth Circuit has imported "some degree of subjective analysis" into this reasonable person standard. (Order at 17 (citing *Construction Contractors Employer Group, LLC v. Federal Insurance Co.*, 829 F.3d 449, 453 (6th Cir. 2016), and *FDIC v. Aetna & Sur. Co.*, 903 F.2d 1073, 1079 (6th Cir. 1990)). This finding – that subjective mental impressions of Fifth Third's Enumerated Discovery Agents are relevant to discovery under subpart "a" of the Discovery Condition – is a sufficient basis for the Order's holding on the "Rule of Necessity" Exception.[5]

However, the Order goes on to discuss subpart "b" of the Discovery Condition, which mandates that discovery occurs when Discovery Agents became "aware of…an actual or potential claim in which it is alleged that the Assured is liable to a third party"[6] – as follows:

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[3] The Discovery Condition is quoted in full on page 8 of the Order, although it is misidentified as the Bonds' Insuring Agreement.

[4] Underwriters believe that this summation does not fully reflect Underwriters' position in their brief, which was that: (i) subpart "a" of the Discovery Condition imposes an objective test for discovery, but that subjective evidence about mental impressions is potentially relevant; and (ii) subpart "b" of the Discovery Condition imposes a subjective test for discovery, making subjective evidence about mental impressions inescapably relevant. Nevertheless, Underwriters are not seeking review of this aspect of the Order as they believe the Magistrate Judge correctly recognized that the parties' different approaches to the Discovery Condition focused on *whose* knowledge counts (because lawyers are among the Enumerated Discovery Agents) and *what kind* of knowledge counts (because subjective "awareness" puts otherwise-privileged communications and mental impressions at issue).

[5] Although the Order did not find it necessary, an analysis of the relevance to the Bonds' Termination Condition of subjective mental impressions of Fifth Third's Enumerated Discovery Agents would also have provided a sufficient basis for the "Rule of Necessity" Exception.

> Read as commonly understood and in the context of the totality of the fidelity bond, this language pins the date of discovery to when any Discovery Agent subjectively believed that an "actual or potential claim" under the bond had arisen. (Order at 17).

The Magistrate Judge's explanation here suggests that discovery for purposes of subpart "b" requires Fifth Third's awareness of "an actual or potential claim under the bond." This formulation implies – without textual evidence or analysis – that Fifth Third must prove when it first gained an awareness of a possible insurance claim under the Bonds, rather than an awareness of a third-party liability claim.

In the very next paragraph, however, the Order also contains a passage that implies the Magistrate Judge understood subpart "b" to require the relevant type of "claim" to be a third-party liability claim. Specifically, the Magistrate Judge characterized Fifth Third's position on the *what-kind*-of-knowledge-counts question as follows:

> In Fifth Third's view, any legal conclusions or mental impressions of its Discovery Agents are irrelevant. Thus, it would not matter if Fifth Third's counsel subjectively believed that Fifth Third could be liable to a third party based on Ross's misconduct, so long as a hypothetical "reasonable person" would not have drawn that conclusion, and so long as no formal "allegations" had been made regarding a covered loss. (Order at 18 (emphasis added)).

The understanding of subpart "b" reflected in this passage does not focus on Fifth Third's awareness of a possible insurance claim, but of a third-party liability claim.

Thus, while Underwriters fully agree with the Magistrate Judge's conclusion that subpart "b" requires proof of – and therefore requires disclosure of – Fifth Third's *subjective awareness* of certain facts, the wording of the Order creates some ambiguity as to *what type* of facts are required to trigger a "discovery" of a loss: a subjective awareness of an actual or potential *insurance claim,* or a

[6] Underwriters note that the necessary "awareness" under both subparts "a" and "b" is further modified by the final sentence of the Discovery Condition: "Regardless of when the act or acts causing or contributing to such loss occurred, even though the amount of loss does not exceed the applicable Deductible Amount, or the exact amount or details of loss may not then be known."

subjective awareness of an actual or potential *third-party liability claim*. Underwriters believe that the second interpretation was the one intended by the Magistrate Judge (and is the correct one), but the Order's wording on page 17 potentially allows for the first interpretation as well.

The difference between these two interpretations is immaterial for purposes of the reasoning underlying the Magistrate Judge's holding on the Rule of Necessity Exception because in either case Underwriters would need access to the subjective mental impressions of the Enumerated Discovery Agents about the existence of an actual or potential claim. Accordingly, Underwriters request that the Court correct this mischaracterization of the Discovery Condition's terms and hold that the subjective awareness required under subpart "b" of the Discovery Condition would be an awareness of an actual or potential *third-party liability claim*.

IV. CONCLUSION

For the foregoing reasons, Underwriters request the Court reverse the May 9, 2017 Order regarding the issues raised above and grant such other and further relief as the Court deems just and equitable.

Dated: May 23, 2017
New York, New York

Respectfully submitted,

__/s/ William J. Brennan___________

David P. Kamp (OH 0020665)
Jean Geoppinger McCoy (OH 0046881)
Brian D. Goldwasser (OH0061926)
WHITE GETGEY & MEYER CO., L.P.A.
1700 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
dkamp@wgmlpa.com
jmccoy@wgmlpa.com
bgoldwasser@wgmlpa.com
Telephone (513) 241-3685

John W. Blancett (admitted *pro hac vice)*
Christopher Losquadro (admitted *pro hac vice)*
Christopher Novak (admitted *pro hac vice)*
William J. Brennan (admitted *pro hac vice)*
SEDGWICK LLP
john.blancett@sedgwicklaw.com
christopher.losquadro@sedgwicklaw.com
christopher.novak@sedgwicklaw.com
william.brennan@sedgwicklaw.com
225 Liberty Street, 28th Floor
New York, NY 10281
Telephone (212) 422-0202

Attorneys for Certain Underwriters at Lloyd's Subscribing to Policy Numbers B0509QA048710 *and B0509QA051310, AXIS Insurance Company, and Federal Insurance Company*

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of this filing to counsel for all parties.

/s/ William J. Brennan______